INQUIRY INTO THE NATURE, EXTENT AND CONSEQUENCE OF INSECURE WORK IN THE ACT

Submission to the Standing Committee on Education, Employment and Youth Affairs Discussion Paper

June 2017
1. Introduction

Legal Aid ACT welcomes the opportunity to make submissions regarding the nature, extent and consequences of insecure work in the ACT. Legal Aid ACT has concerns regarding the prevalence of insecure work in the ACT, and its impact on the well-being and productivity of ACT residents, industry, particularly in regards to low income and vulnerable members of the ACT community.

Legal Aid ACT has a particular interest in regards to this issue, due to the legal services it provides to the ACT in relation to employment and industrial laws. Legal Aid ACT runs an employment law clinic through its General Practice once a week in which lawyers provide free 1 hour appointments to clients in relation to their employment matter. In 2015-2016, the General Practice provided 393 duty advices in relation to employment matters. In 2016-2017 this number increased to 464.¹ A significant proportion of our clients have insecure work patterns and have been subjected to exploitive work practices in the ACT.

2. Meaning of ‘insecure work’

Legal Aid ACT notes the Committees’ observation that ‘insecure work is not a clearly defined concept’.² It has been broadly referred to as ‘non-standard’ employment,³ precarious or ‘unstable employment’,⁴ and ‘poor quality’⁵ employment, in various discourse. In almost every case, certain characteristics including poor or irregular pay, unpredictable hours, unpredictable length of employment, substandard or no access to entitlements including paid and unpaid leave, and poor working conditions are prevalent.⁶ As the ACTU Independent Inquiry identified, these appear to manifest most commonly where labour hire arrangements, casual work, fixed-term contracts, sham contracting, and independent contracting arrangements are in place.⁷ However, not all arrangements of these kinds constitute ‘insecure work’. Many are legitimate, allowing for both business and employee flexibility, and have been implemented for the mutual benefit of employees and employers.⁸

Legal Aid ACT submits that, in the interest of promoting clarity and ensuring the efficacy of any future proposed measures, the Committee adopt a clear definition of ‘insecure work’. This definition should be broad, delineated by reference to characteristics rather than specific work-type arrangements. At the same time, the aspects and characteristics that constitute ‘insecure work’, for e.g. ‘poor pay’ or ‘poor working conditions’, should be drafted plainly and concisely, so that courts and policy makers have a solid understanding of relevant factors to consider that contribute to ‘insecure work’.

3. Impact of ‘insecure work’ on families and the community

¹ This does not include numbers of additional grant assisted clients.
⁶ Ibid.
⁷ Ibid.
As noted above, flexible and non-standard working agreements can have many benefits for the individuals and the community. This is particularly so for parents returning to the workplace requiring flexible working arrangements, and for students structuring paid employment around study obligations. However, Legal Aid ACT submits that ‘insecure’ work (as distinct from ‘non-standard working agreements’) has significant and detrimental effects on families, workers, and particularly low income and vulnerable members of the ACT community.

**Individual Impacts**

The impacts of insecure work are far reaching and cyclical. Insecure work that nets employees’ low or irregular pay, offers unpredictable working hours and little or no entitlements, reduces employee capacity to build and maintain a secure and happy lifestyle. ACTU has observed that a ‘lack of income security …can have severe impacts on workers’ living standards and financial independence’, affecting their ability to secure loans, affordable housing, pay bills on time, and make proactive plans for the future.9 Associated feelings of vulnerability, desperation, uncertainty and powerlessness compound to create both physical and mental health concerns, including increased levels of anxiety and stress that affect inter-personal and personal relationships.10 Lenders that do provide loans to individuals with poor or non-existent income security tend to offset risk by imposing higher interest rates.11 The resultant fears, of failure to meet payments and high debt, often increase employee willingness to accept poor or exploitative conditions. As few providers of insecure work are likely to be willing to offer opportunities for education, training, or up-skilling,12 employees are effectively denied the opportunity to progress into secure, permanent positions. They remain trapped in a cycle of insecure employment.

Insecure work also impacts families. Whilst the Fair Work Act 2009 (Cth) (FWA) mandates National Employment Standards (NES), many workers engaged in ‘insecure work’ are not, or are only partially, protected.13 For many, the inability to take paid parental or carers leave, the restrictions on the capacity to request flexibly working hours, no access to redundancy pay and no notice of termination, engenders familial stress and dysfunction.

Legal Aid ACT notes that independent contractors are also completely excluded from the NES. While this is done in part ‘to protect the “freedoms” of independent contractors’14 (who are subject to other regulations under the Independent Contractors Act 2006 (Cth)), in cases where ‘sham’ contracting15 occurs (and it appears to occur most commonly in the building and construction industry)16, Legal Aid ACT submits it has an extremely detrimental impact on workers. These workers are unfairly denied access to rights and entitlements. Moreover, whilst the FWA does boast certain sham contracting prevention provisions,17 and “recent judgments from the Federal Court… [may] suggest a greater

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10 Ibid.
13 Either because they do not fall within the definition of ‘employee’, being an independent contractor, or because they are casual, under a labour-hire agreement etc. See generally the Fair Work Act 2009 (Cth).
15 That is, the deliberate misclassification of employees as independent contractors, done with or without the contractors knowledge, often for the purpose of avoiding liabilities, costs associated with workers compensation and unfair dismissal claims, and paying out superannuation, tax, redundancy payments etc. See Professionals Australia, ‘The Impact of the Labour Hire Industry and Insecure Work on the Professional Workforce’ (2015) Submission to the Victorian Government’s Inquiry into the Labour Hire Industry and Insecure Work, 8.
17 Fair Work Act 2009 (Cth) ss 357–9.
willingness to find that workers are in substance being hired as employees, even in the face of carefully drafted contracts that present them as independent contractors. Legal Aid ACT submits current protections from sham contracting remain largely ineffective. The dominant position of the employer, and the workers lack of access to collective bargaining power, generally restricts their ability to negotiate better arrangements. Uncertainty regarding the application of the common law test for ‘employee’ (which utilises a multifactorial approach, taking into account levels of control, hours worked, delegation models, tax and entitlements, mode and level of pay and equipment provision) persists. As Roles and Stewart have noted, many judges continue to apply the test to extremely similar fact scenarios yet reach competing outcomes. This is in addition to the fact that many workers, being highly dependent on the income, are reluctant to seek redress. Even where regulators do investigate potential sham arrangements, ‘the majority of cases do not result in court action’. Further legislative and regulative measures, including a reformation of the current common law test for employee, are required.

**Broader Impacts**

Legal Aid ACT submits that insecure work also has large-scale impacts upon the ACT community. One potential impact is increased costs borne by younger demographics supporting older workers who, having been subject to long-term insecure working conditions, retire on little to no superannuation, and are heavily reliant on welfare safety nets. Whether one subscribes to Ann Numhauser-Henning’s view that ‘social sustainability requires increased labour market participation for healthy, elderly individuals who live active and independent lives’ or not, the drain on social, health care and governmental resources is clear.

A second, less measurable cost is the social impact on family and community wellbeing, and emotional and mental health. Increased levels of workplace related anxiety, injuries that cannot be claimed under workers compensation, and financial and housing stress generally, place a continual and heavy burden on government resources. Further, lack of training and investment in developing workplace skills and education may have a detrimental effect on industry in future years. Workplace productivity may also suffer; evidence suggests that employment security may ‘improve workers welfare and productivity’. More concretely, sham contracting in the construction industry has been estimated to ‘cost the Commonwealth government almost 2.3 billion in lost tax revenue every year’.

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23 Productivity Commission, ‘Inquiry Report: Workplace Relations Framework’ (2015) No. 76. Vol 2. 808. The Submission noted that in 2014-15, the Fair Work Ombudsmen finalised 301 complaints relating to misclassification and sham contracting. 29 per cent of complaints were sustained (the contravention rate), 23 letters of caution were issued, and only 6 sham contracting matters were commenced in court. See also Cameron Roles and Andrew Stewart, ‘The reach of labour regulation: Tackling sham contracting’ (2012) 25 Australian Journal of Labour Law 258, 278.
4. Impact of ‘insecure work’ on vulnerable workers

Insecure work disproportionately impacts temporary visa holders and migrant workers. Legal Aid ACT submits that the current immigration system and the manner in which and the type of visas that are granted to migrants can promote insecure work within the community. As a submission to the Victorian Inquiry notes, in regards to temporary migrant workers, a power imbalance in the employment relationship is exacerbated because the worker’s residency status is tied to the ‘ongoing sponsorship by the employer, adding a further level of domination’.

Temporary migrant workers

Migrant workers on temporary work visas often have conditions on their visa that limits the ability for the worker to work for another employer. It is noteworthy that almost 1/3 of 4000 temporary work sponsors (most of visa 457) were found to have breached their workplace obligations by the Department of Immigration and Border Protection in 2015. This lack of mobility can promote vulnerability for the migrant worker.

Temporary migrant workers may also face further difficulties than other employees in accessing remedies under the FWA if their employment is unfairly terminated. Mudaliar notes that ‘if a migrant worker brings a claim of unfair dismissal under the Fair Work Act 2009, there is no standard process through which workers with claims of genuine merit can be granted a bridging visa to pursue their claim or the opportunity to seek another job in Australia if the claim is upheld.’ This can result in migrant workers not raising concerns with their working conditions due to fear of retaliatory action and termination of their employment, which may adversely affect their visa status.

 Whilst the Migration Legislation Amendment (Worker Protection) Act 2008 does create new obligations for employer sponsors, and increased penalties and sanctions for employers that breach their obligations, Legal Aid ACT submits that this legislation does not go far enough in offering adequate protection to vulnerable migrant workers.

Anecdotally from our experience in providing free legal advice and assistance through our General Practice’s employment clinic, temporary migrant workers are still subject to exploitive working conditions including below Award rates of pay, no payment of penalty rates or overtime, excessive working hours, employer’s reducing pay for the cost of the original visa and travel costs and recruitment fees.

Temporary migrant workers may also be reluctant to request changes to their pay, working conditions or take legal action against their employers due to fears that their employment may be terminated or their visa sponsorship revoked. Sponsoring employers can make future promises to temporary migrant workers about ‘sponsoring their permanent residence’ status in the future, and this discourages workers from making complaints about their current working conditions.

Further, the use of temporary working visas appears common in insecure, low paid, unskilled or semi-skilled jobs and trades. We note that in other jurisdictions “low-skill migrant workers are heavily recruited into jobs in hospitality, construction, agriculture, and private household sectors that are known for their precarious nature and low pay of the employment they generate” which can further compound vulnerabilities faced by temporary migrant workers. These factors are often compounded

28 Ibid 301; see also Australian Government Department Submission, Education and Employment References Committee, Senate Inquiry into the impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders (15 July 2015) 21.
by social vulnerabilities including a lack of knowledge surrounding Australia’s industrial laws, social isolation, language barriers and limited social integration within the community and with our social support services.

**Case Study**

Matt sought advice from Legal Aid ACT’s employment clinic. Matt was on a temporary work visa and English was his second language. Matt had been working as a casual employee at a restaurant in the ACT for over 12 months. Some weeks Matt only received a few shifts, some weeks he worked over 40 hours a week. Matt sometimes received his wages in cash and sometimes in his bank account. Matt never received payslips from his employer. Matt’s boss often threatened that if he complained he would be fired. Matt couldn’t afford to be fired as he was alone in the ACT and didn’t have any family and few friends. Matt was worried he wouldn’t be able to pay his rent.

Matt had been told by a friend that his boss was “ripping him off” and wanted to know whether he was being paid correctly. Matt wasn’t aware that of any of Australia’s workplace laws and was advised that he had been significantly underpaid by his employer who had not been paying him the correct pay rate, overtime rates or penalty rates.

Matt was not sure what to do. He was scared of his boss and didn’t want lawyers to get involved as he was scared his visa would be cancelled. Matt decided to do nothing at the time, because he didn’t know where to start...

**Student Visas**

There are around 8 types of different student visa categories, but generally student visas have a restriction on the amount of hours the student can work with the most common restriction being 40 hours of work per fortnight.

There is anecdotal evidence that suggests that a significant portion of young workers on student visas are underpaid and their employers show poor compliance with workplace laws in regards to these workers, which often results in students being pressured to work in breach of their visa requirements if they want to obtain paid employment or keep obtaining shifts in their current employment. The employer often then creates a heightened power imbalance, by leveraging the worker’s non-compliance with their visa conditions to exploit the worker further or put the worker in a position where the worker agrees to poor working conditions or ongoing exploitation due to fear of retaliatory action by the employer. A fear of visa cancellation may also prevent reporting of exploitation to the relevant authorities.

**Young People**

Young people appear to bear the brunt of increased work insecurity in our community due to lower education levels, (often due to their limited or underdeveloped skill set and lack of ability or knowledge of what services to seek assistance from) and their relative inexperience in the workforce which can contribute to their vulnerability.

We note the statement by the Australian Council of Trade Unions in its Independent Inquiry in regards to insecure work and young people is particularly relevant, noting the ‘strong relationship between casual employment, age and gender’. Casual employment is most common among young workers, with 20% of all casual workers aged between 15-19 years and just under 60% of all casual

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workers under 35 years of age. Women are much more likely to be in casual employment than men: with 25.5% of all female employees are casual compared to 19.7% of male employees. Most workers in Australia who work part-time (54%) work in casual employment. Just over 30% of casual employees work full-time hours”.34

Case Study
Jess was a student on an international student visa studying at the University of Canberra. She was originally working 20 hours a week on a casual basis in accordance with her visa at a retail shop in Canberra. Her boss asked her to work more hours over the busy Christmas period, Jess indicated she wasn’t allowed to, however her boss threatened that if she couldn’t work the extra hours then she would lose her job.

Jess needed the job to support herself while she studied, so she agreed to work the extra hours. Jess is scared that she is breaching her visa conditions. Her boss won’t let her go back to her original hours and keeps saying she could report her to immigration.

Jess is very stressed as she can’t keep up with the extra work and her study, but doesn’t want her visa to be cancelled.

Jess resigned from her job, but is struggling to find other work that will allow her to work the hours she needs to fit in with her study.

Women
There is also a gendered nature to insecure work in so far as it disproportionately affects women in the workforce. Historically, there have been ‘clear differences … between men and women when it comes to attaining job security and employment security; [with] women … lagging behind men.’35

This is particularly the case for women re-entering the workforce after periods of focusing on caring and family responsibilities. Women may often agree to poor working conditions in order to obtain flexibility arrangements. This can lead to detrimental effect on women’s career progression, their financial security and place additional stress on their family and care arrangements.36

Indigenous & CALD
Indigenous Australians and culturally and linguistically diverse (CALD) individuals may also be overrepresented in insecure work.37 ACTU has observed:

“Workers from culturally and linguistically diverse backgrounds are also particularly vulnerable to finding themselves trapped in insecure work or subject to exploitive working conditions. This can result from social isolation, low English literacy, discrimination in the workplace and a lack of education and information about rights and entitlements at work in languages other than English. Critically however, there is limited accurate statistical information about the extent of insecure work amongst CALD communities, leading many to label this an “invisible” issue.”38

34 Ibid.
37 Ibid 23.
38 Ibid.
Legal Aid ACT submits that anecdotally, CALD clients that seek advice in relation to an industrial issues have little or no awareness of the FWA or accepted workplace practices and are often unaware that the poor working conditions that they have been subjected to, amount to breaches of workplace legislation. Community legal education particularly for community members from an indigenous or CALD background is essential to educating vulnerable workers about their workplace rights.

5. Conclusion: the ACT Approach & long term impact of insecure work

The prevalence of insecure work is concerning. When compared with full time employment which has traditionally incorporated ‘a degree of regularity and durability in employment relationships, protect[ed] workers from socially unacceptable practices and working conditions, established rights and obligations, and provided a core of social stability to underpin economic growth’ it is questionable whether the benefits of non-standard working arrangements outweigh the vulnerabilities and conditions of exploitation often commonly present with insecure work arrangements.

Legal Aid ACT submits that it is unlikely that the ACT regulatory arrangements can operate effectively to address the concerns around insecure work. A uniform national approach is likely required that incorporates changes to the FWA including amending the definition of employee for the purposes of capturing sham contractors and changes to the entitlements available to casual and fixed hire workers. Legal Aid ACT also submits generally that ‘our labor and employment laws should be judged by what they contribute to human dignity and the just social order’.

It is however important for the ACT community to be aware of the nature in which insecure work impacts particularly vulnerable members of our community. Government, community organisations and businesses within the ACT have a vital role in ensuring compliance with obligations pursuant to the current FWA and other workplace legislation. Education initiatives for employees and employers alike are important, and may assist with decreasing the prevalence of unfair work arrangements, and contributing positively to the ongoing development of a just society.
